United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1348

To be argued by
EDWARD BRODSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1367

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT BERKSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT ROBERT BERKSON

EDWARD BRODSKY, ESQ.
Spengler, Carlson, Gubar,
Churchill & Brodsky, Esqs.
Attorneys for Defendant-Appellant Robert Berkson

HENRY J. BOITEL,
ALAN DERSHOWITZ,
Of Counsel.

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Preliminary Statement

Robert Berkson appeals from a judgment of conviction entered against him on July 21, 1976 in the United States District Court for the Southern District of New York after a jury trial before the Honorable John M. Cannella. The indictment, filed June 18, 1975, originally contained ten counts. In essence it charged that Berkson and others, who were officers and employees of the stock brokerage firm of Packer, Wilbur & Co., Inc. [hereinafter, "PW"], sold and pledged securities of PW customers by forging stock transfer powers and using the proceeds to benefit PW.

The defendants held the following positions in PW: a) Wilbur Hyman, who was a fugitive in Spain at the time of trial, was a registered principal and president, b) Maurice Rind, the only co-defendant to stand trial

with Berkson, was a registered representative and vice-president, c) James Gallentine, who pleaded guilty to one count of the indictment and testified as a government witness at trial, was the cashier and was in charge of back office operations, including the maintenance of books and records and custody of securities held in trust for the PW customers.

Berkson and Rind were tried twice. The first trial ended in a hung jury on May 11, 1976 and a dismissal by the Court of Count I of the indictment. The second trial commenced on June 3, 1976; on June 9, 1976 the jury found both defendants guilty of Counts three through ten, and not guilty of Count two. The guilty verdicts were as to the following charges:

Count three charged mail fraud (18 U.S.C. § 1341) with respect to a December 15, 1970 mailing of 618 shares of common stock of Leasepac Corporation [hereinafter, "Leasepac"] from PW in New York, to the brokerage firm of Schreiber Bosse & Co., in Cleveland, Ohio. Counts four and five, respectively, charged a scheme to defraud (15 U.S.C. § 77q[a]) by mailing of confirmations of purchase of common stock of Robotguard Corporation [hereinafter, "Robotguard"] from PW, in New York, to the First Philadelphia Corporation, in New York, on August 21, 1970, and September 18, 1970.

Counts six through nine, respectively, charged the defendants with the interstate transportation of forged securities (18 U.S.C. § 2314) with respect to three deliveries of Leasepac stock (Counts six, eight and nine), and one delivery of Robotguard Stock (Count seven) during the period from August 18, 1970 through March 22, 1971. Count ten charged the defendants with conspiracy to engage in the above noted conduct (18 U.S.C. § 371).

On July 22, 1976, the trial court suspended sentence as to Berkson, placed him on probation for a period of five years, and imposed a fine of $25,000.00.

Questions Presented For Review

1. Relying upon Rule 801(d)(1)(A) of the Federal Rules of Evidence, the trial court permitted the government to introduce, as substantive evidence against appellant, the prior grand jury testimony of a critical government witness. The grand jury testimony stated conclusions and opinions. It failed to distinguish between two persons about whom the witness was testifying, and was otherwise incompetent. In view of these defects, was it error for the court to have received the grand jury testimony as substantive evidence?

2. Apart from the above noted breach of evidentiary standards, was the admission of the grand jury testimony violative of the appellant's rights to due process of law and to cross-examine the witnesses against him?

3. Did the prosecution fail to prove the defendant's guilt beyond a reasonable doubt?

4. In view of the nature of the government's proof, was it error for the trial court to permit the jury to convict upon the theory of "conscious avoidance"?

Statement of Facts

Introduction

James Gallentine, the PW cashier, and other PW employees at Gallentine's direction, forged customer's names to stock certificates or stock transfer powers which were negotiated for PW's benefit and used to buttress PW's poor financial condition. The jury was presented with

two questions as to Berkson: (1) did he know that customers' securities, with forged signatures, were being sold or pledged for PW's benefit; and (2) if he did know, did he participate in that scheme. If the jury answered either question in the negative they were required to acquit Berkson.

No witness testified that Berkson knew of the forgeries or that he participated in the scheme. On the contrary, each witness who participated in the forgeries denied discussing them with Berkson. However, James Gallentine who testified at trial that he did not discuss the forgeries with Berkson, previously testified before the grand jury that Berkson "knew" about the forgeries.

The government repudiated Gallentine's trial testimony with respect to Berkson and, over the defendant's objection, relied upon his grand jury testimony as substantive evidence. Without Gallentine's grand jury testimony there was no evidence of the crimes charged against Berkson. Gallentine's testimony is central to the issues raised upon this appeal. Therefore, we shall first analyze his trial and grand jury testimony and then the remainder of the evidence.

1. Gallentine's trial testimony.*

Gallentine testified as follows at trial:

During 1970 and early 1971, Gallentine was employed at PW as the cashier, and he was in charge of back office

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* Gallentine entered a plea of guilty to one count of the indictment and testified as a government witness at trial (Tr. 31).

operations, record keeping, bookkeeping, accounting, and custody of customers' securities (Tr. 32-5). Berkson's non-involvement in Gallentine's functions was made clear at the outset of Gallentine's examination by the government:

> "Q. Who were your superiors at Packer, Wilbur & Co.?
>
> "A. Mr. Hyman was the president. He was my superior.
>
> "Q. Did you take orders from any one other than Mr. Hyman?
>
> "A. I took orders from Mr. Rind.
>
> "Q. Anyone else?
>
> "A. No." (Tr. 33)

During August and September, 1970 PW was usually in an overdraft position in its bank account (Tr. 36-9; GX 26, 36 and 37) which would be covered either by the deposit of PW's daily receipts or by stock trades which were posted with the bank as collateral after Gallentine would discuss the matter with Rind (Tr. 38-9).*

In August, 1970 Rind told Gallentine that Rind was going to negotiate a loan for PW using ten thousand shares of Leasepac stock which PW had in its trading position. Rind asked Gallentine to prepare the shares

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* Gallentine also testified that, at the direction of Berkson and Rind, he exchanged checks with PW as part of a check kiting scheme to inflate PW's bank balance (Tr. 129-30; GX 40-1). Similar testimony was elicited from Hyman's secretary, Patricia May, who engaged in the check kiting at the request of Hyman —the checks being signed by Berkson (Tr. 342-8; GX 33, 33a, 33b). No interrelationship was shown between the check kiting scheme and any of the events charged in the indictment, and the Court instructed the jury that the check kiting evidence was received only for the purpose of establishing motive (Tr. 347).

for the transaction.* Gallentine found that PW did not have 10,000 shares of Leasepac stock in its trading position and made up the deficiency by forging customers' Leasepac securities. (Tr. 40-2).

In August, 1970 Gallentine also found that PW was short 2,000 shares of Leasepac needed to satisfy a trade with Schreiber Bosse & Co. He told Rind and Hyman that PW did not have enough stock to cover the transaction and then he had customers' securities forged to satisfy the deficiency (Tr. 58). (GX 2 through 2f [Tr. 51-4]). At about this time, Rind told Gallentine that he was raising $1,000,000.00 in new capital for PW and Hyman told Gallentine that PW had 20,000 warrants on Leasepac stock which were going to be exercised and which would be available to cover the customers' stock (Tr. 56). Later in August, 1970, another 2,000 share block of stock was sold to Schreiber Bosse & Co., and 1,000 shares of forged customers' securities were used to cover the transaction (Tr. 60-5). (GX 6, 6b, 6c and 6d). Later, Gallentine told Rind that he was signing customers' names to stock powers to satisfy the transaction (Tr. 65).

On August 20, 1970 a block of 27,000 shares of Robotguard stock was received by PW and credited to the ac-

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* A number of documentary exhibits were received with respect to this transaction—a $300,000.00 loan which was negotiated by Rind with the Euclid Bank in Ohio with Leasepac stock used as collateral (GX 15, 16, 17, 18, 19, 19a and 19b; Tr. 43-9). GX 15 is a certified copy of a PW resolution, dated August 11, 1970, and signed by Berkson as secretary of the Corporation (Tr. 49-50), concerning the authorization to pledge the Leasepac stock as collateral for the loan. There is nothing in the record which shows that Berkson knew that customers' securities were being used in this transaction.

** Gallentine appears to have assumed that Rind knew that customers' accounts would have to be invaded in order to meet Rind's request.

count of Ephraim Bloch, the chairman of Robotguard and a customer of PW (Bloch's transactions with PW are discussed in further detail *infra*, pp. 13-15). Hyman told Gallentine that the stock belonged to PW (Tr. 71-2) and thereupon Gallentine transferred ten thousand shares of stock out of Bloch's account to the PW account. Gallentine forged Bloch's signature and the shares were delivered to the Sterling National Bank as security for the account of R. G. Berkson & Co.* On September 22, 1970, the certificates were returned to PW by the bank. (GX 4b, 12, 13, 13a, 14 and 14a).

The next day, at Rind's direction, Gallentine forged 15,000 shares of the Bloch Robotguard stock to cover a sale to the First Philadelphia Corporation. (GX 4c, 4a and 4d). The shares were returned to PW within a few days through arrangements made by Rind (Tr. 75-6).

In September, 1970 Hyman obtained a loan for PW from Abraham Katz.** Gallentine testified that the Robotguard shares for this transaction were given by him to Rind at Rind's request (Tr. 77-8).

On August 26, 1970, PW received a substantial block of Robotguard stock belonging to Ephraim Bloch's business associate, David Lipschutz (Tr. 78 and GX 5b). Lipschutz's dealings with PW are explained in more de-

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* The record fails to provide any particulars with respect to the nature and function of R.G. Berkson & Co.

** Katz, a government witness, testified that Hyman gave him the stock on September 2, 1970 and that Katz, in turn, pledged the stock with the Atlantic Bank of New York. The bank sent the stock to the transfer agent to have it transferred into Katz's name, thus causing the fact of the transaction to become public. This led to Ephraim Bloch first learning that a portion of his stock had been utilized by PW without authorization, as indicated *infra*. p. 14.

tail *infra*, at pp. 13-15. On September 18, 1970, 6,000 shares of that stock were sold to the First Philadelphia Corporation, pursuant to Hyman's instructions to Gallentine that the stock could be used by PW in the same manner that the Bloch stock had been used (Tr. 79-80; GX 5, 5a, 5b, and 5e).

On December 8, 1970, pursuant to Rind's instructions, Gallentine delivered 25,000 shares of Leasepac stock with forged signatures to Schreiber Bosse & Co. Certain of those securities were forged (Tr. 80-3; GX 8b, 8c, 3 and 3b).

As of February 26, 1971, PW ceased operations and was in the process of delivering all securities to its customers (Tr. 89). On that day, pursuant to a discussion with Hyman, Gallentine sent a letter (GX 1a) to the Irving Trust Company, together with some of Ephraim Bloch's stock (GX 1b and 1c) to have that stock transferred to the names of PW customers other than Bloch, whose Robotguard stock had been misused in other transactions (Tr. 86-90). Again, Hyman told Gallentine that Bloch's stock could be used as though it belonged to PW (Tr. 90-1). Gallentine testified that in September, 1970, PW received a stock dividend with respect to stock certificates that had been transferred from customers' accounts into the PW account. He thereafter told Berkson that the customers would not be receiving the dividend directly since they were not stockholders of record. Berkson responded that a record should be kept so that it would be known who was entitled to the dividend and that he would speak to Rind about it (Tr. 94-7). Gallentine's testimony does not contain any suggestion that he told Berkson that this state of affairs was the result of a misuse of customers' securities.

2. The use of Gallentine's grand jury testimony as substantive evidence.

At no time in Gallentine's trial testimony did he mention any knowlege or involvement of Berkson relating to the unauthorized use of customers' securities. Gallentine denied having any conversations with Berkson about the forged customers' securities. At that point in his testimony, over defense objection, the Court permitted the prosecutor to read to the jury the following portion of Gallentine's June 4, 1973 grand jury testimony which was received as substantive evidence in the case (Tr. 102-105).*

> "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the Firm?
>
> "A. No, no. Mr. Rind just handled—Mr. Rind set up the transactions, be they sales or loans, and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind.
>
> "Q. Well, you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?
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> "A. Well, I had conversation with them as to how we got through the day cash-wise, what we had to do in order to get up the amount of cash necessary.

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* The Court initially ruled that the testimony was admissible for purposes of impeachment, and reserved decision as to whether it would be received as substantive evidence pursuant to Rule 801(d)(1)(A) of the Federal Rules of Evidence (Tr. 97-101). Subsequently, the Court charged the jury that the testimony could be used as substantive evidence in the case (Tr. 569).

"Q. In other words, from time to time, you would tell them that Mr. Rind arranged for the transactions in stock to generate some cash and you provided customers' securities to cover that transaction, and that is how you got the cash on a particular given day?

"A. Yes, yes.

"Q. And you would explain to them that you actually went through the process of the unauthorized use of customers' securities for this purpose?

"A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities.

"Q. And both Mr. Berkson and Mr. Hyman knew about that?

"A. Yes.

"Q. And the reason you can say that is that you specifically recall telling them about what was was going on?

"A. Yes, I spoke to them about it."

Without the aforesaid testimony there was insufficient evidence to convict Berkson.

In his trial testimony, Gallentine explained that in his grand jury testimony he was trying to be helpful to the prosecutor and was merely articulating "what may have happened. But that is not exactly the way it did happen." (Tr. 105-6).

On cross-examination, Gallentine testified that Berkson never had anything to do with the physical custody

of stock certificates or with the books and records of PW (Tr. 133). With reference to his discussion with Berkson concerning certain customer dividends referred to above which, he explained the variety of legitimate reasons which could cause such dividends to go to the brokerage firm rather than to the customers (Tr. 137-9).

Gallentine further testified that, prior to his grand jury testimony, he had met with the prosecutor on perhaps fifteen occasions over the course of two or three months and told the prosecutor that he had no reason to believe that Berkson had any knowledge of the forgeries or unauthorized uses of customers' securities (Tr. 141-2). Moreover, before trial Gallentine told the prosecutor that his grand jury testimony was inaccurate (Tr. 144). He reaffirmed, on cross-examination, that he had no recollection of ever telling Berkson about the forgeries or misuse of customers' stocks during the period that PW was still in business (Tr. 146-148).*

3. The testimony of other PW employees.

Linda Sussman, Rind's secretary, testified that on one or two occasions, at Gallentine's request, she signed customers' names to stock transfer powers. Berkson never asked her to do so, nor was he ever present when she did so (Tr. 2-5).

Loretta Ottinger, a PW bookkeeper, testified that on four or five occasions, she signed customers' names to stock transfer powers upon Gallentine's representation that it was proper to do so. Berkson never asked her to do so and was never present when she did so (Tr. 6-9).

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* PW closed in March, 1971, Gallentine was first called to the U.S. Attorney's Office sometime in 1973, and it was not until after that that Gallentine imparted this information to Berkson (Tr. 148-50, 162).

Eugene Pugliese, who maintained the PW purchase and sales blotter, testified that on fifteen or sixteen occasions, at the request of his immediate supervisor, Gallentine, he signed customers' names to stock transfer powers. He said that he never had any conversation with Berkson concerning these activities (Tr. 10-28).

Anthony Salamone, a PW runner, testified that his immediate supervisor, Gallentine, directed him to sign customers' names to stock powers on a number of occasions. Berkson never asked Salamone to do so and they never talked about the matter (Tr. 29-30).

4. The Leasepac customers.

Eleven former customers of PW, with holdings in Leasepac ranging from 100 to 600 shares, testified that without their permission, their names were endorsed to stock powers which were attached to their securities and that they had not received either their certificates or the proceeds of those certificates.*

Eleanor Melling was the only one of these witnesses who dealt with Berkson. During the summer of 1970, she asked Berkson whether she should sell her Leasepac holdings and Berkson advised against it (Tr. 254-7).

Sam Caplan was the twelfth and only remaining customer with Leasepac holdings who testified. He bought

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* Melvin Mayerson (Tr. 242; Exhibit 22); Jeffrey Goldman (Tr. 249; Exhibit 21); Rudolph Rado (Tr. 251; Exhibit 6d); Eleanor Melling (Tr. 254; Exhibit 11a); Ethel Kaufman (Tr. 259; Exhibit 8a); Anita Zatzkin (Tr. 262; Exhibit 11a); Elmer Twente (Tr. 265; Exhibit 11c); Jerome Harris (Tr. 273; Exhibit 9); Joseph Friedman (Tr. 276; Exhibit 6c); Maurice Scwach (Tr. 277; Exhibit 8); Irving Bell (Tr. 335; Exhibit 3a); Robert Bader (Tr. 340; Exhibit 6b).

300 shares of Leasepac through PW and he gave Berkson discretion to trade the securities in his account. Pursuant to that discretion, Berkson sold 200 shares of the stock and forwarded the proceeds to Caplan (Tr. 230-1, 238-241).

On March 4, 1971, when PW was in the process of liquidating, Caplan wrote to Berkson requesting that the remaining 100 shares be transferred to another brokerage company, together with Caplan's other securities which were on deposit with PW (GX 28; Tr. 233). The other stocks were delivered as requested, but the Leasepac was not. A week or two later, Caplan talked to Berkson about the requested transfer of the outstanding 100 shares of Leasepac to the other brokerage firm and Berkson said he would take care of it (Tr. 231). Caplan could not recall whether or not Berkson told him that PW did not have the securities in its possessions (Tr. 234-6). The stock certificate representing Caplan's 100 shares (GX 28a) bears Caplan's forged signature, (Tr. 236-7). Caplan testified that Berkson had authority to negotiate the certificate but there is no evidence that Berkson knew about or participated in the negotiation.

5. The Robotguard customers.

In 1968, PW was the managing underwriter for the public offering of Perfectfit, Inc., a company in which Ephraim Bloch was a principal. In March, 1969, PW was the managing underwriter for a public offering of Robotguard stock, a company in which both Bloch and David Lipschutz were principals (Tr. 321). In view of its underwriting status, PW had an interest in avoiding a decline in the price of Robotguard stock.

In July, 1970, a block of Robotguard stock suddenly appeared on the market, and the price declined. Berkson

called Robotguard's attorney, Alan Salovin, and asked whether Bloch and Lipschutz were selling their Robotguard stock. Salovin said that he did not know, but that he had advised them that there was no legal reason for them not to sell their stock (Tr. 324, 326). Shortly thereafter, Salovin received a telephone call from Rind, who angrily protested Robotguard sales by Bloch and Lipschutz. Rind said that such sales were prohibited by insider restrictions and were adversely affecting the market price (Tr. 326). Salovin responded that there was no restriction upon such sales.

In fact, Bloch and Lipschutz were selling off substantial quantities of their Robotguard stock. At or about the time of the conversations with Salovin, Bloch received a telephone call from Hyman who protested that the sales were damaging the market in the stock and claimed that his partners were upset about the sales. At Hyman's request, the outstanding shares of Bloch and Lipschutz in Robotguard stock were delivered to PW on August 20, 1970 to guarantee to Hyman that the shares would remain unsold (Tr. 301-303, 312-313; GX 4b and 5f).

In December, 1970 Bloch heard that a substantial quantity of the shares that had been deposited with PW had been sold. He called Hyman who later told him that it was a bookkeeping error (Tr. 306). Later, Bloch again heard that a substantial quantity of the Robotguard stock had been sold and he again contacted Hyman. This resulted in a meeting between Bloch and Hyman at which Hyman admitted that the Robotguard shares had been sold. There were then several weeks of negotiations which terminated in Hyman's agreement to pay $1.00 a share for the Robotguard stock that had been sold (Tr. 307-8). In February, 1971, Bloch had still not received the settlement payment and he asked Rind about it. Rind refused to pay Bloch anything.

In the interim, Lipschutz had sent a letter to Hyman, followed by a telephone call, requesting that Lipschutz's 10,500 shares be registered in Lipschutz's name (Tr. 314-15; GX 5c). Subsequent oral and written requests by Lipschutz for deliverey of his stock to him, met with no success (*See*: Lipschutz's letter to PW marked GX 5d and dated April 8, 1971).

Both Bloch and Lipschutz denied that they ever authorized PW to use their stock or to sign stock transfer powers in their names (Tr. 303, 313-14; GX 1c, 4c, 7c and 11). Both men testified that their dealings were principally with Hyman (Tr. 311, 319), and neither man testified to any dealings with Berkson.

6. The testimony of Martin Berkson.

Martin Berkson, the defendant's father, was called as a government witness. In August or September of 1970 his son asked him to purchase 10,000 shares of Robotguard stock. He agreed to do so, and had more than sufficient funds for that purpose. However, a few days later, his son told him that it would not be necessary (Tr. 352-6).

ARGUMENT

POINT I

Gallentine's grand jury testimony should not have been received as substantive evidence since its content did not conform to federal constitutional or evidentiary standards.

1. Gallentine's grand jury testimony was conclusory, non-specific, and otherwise incompetent and should not have been received as substantive evidence.

Gallentine's grand jury testimony was admitted, over objection, under authority of Rule 801 of the Federal Rules of Evidence. Rule 801(d)(1)(A) [hereinafter, "Rule 801"] provides:

> "(d) Statements which are not hearsay.
>
> "A statement is not hearsay if—
>
> "(1) Prior statements by a witness—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) Inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, * * *"

The Court below found that the grand jury testimony of Gallentine was within Rule 801 and charged the jury that it could be used as substantive evidence. (Tr. 97-103, 367, 382, 558, 569). As further explained *infra*, literal conformity with the requirements of Rule 801 is insufficient if the prior testimony does not also conform to other evidentiary rules with respect to the admissibility of trial testimony. If, as we urge, Gallentine's testimony vio-

lated other evidentiary rules, then its use as substantive evidence was prejudicial and reversible error.*

Prior inconsistent statements are usually used by a cross-examiner to impeach a witness. For that purpose, "inconsistency" is usually broadly interpreted and the cross-examiner is given a good deal of latitude. We are concerned here with a qualitatively different type of situation. In attempting to use the prior inconsistency as affirmative evidence constituting the witness's sole inculpatory accusations against the defendant, the concept of "inconsistency" must be strictly construed, and a determination must be made as to whether the allegedly inconsistent testimony would have been admissible if given at the trial in the first instance. In the present case, the trial court declined to assess Gallentine's grand jury testimony in those terms but appears to have followed the impeachment standard in determining the admissibility of the testimony for substantive purposes.

Our review of the draftsman's notes and legislative history with respect to Rule 801 fails to disclose any mention of the problem posed here. A related problem is discussed in IIIA Wigmore on *Evidence*, § 1041, at p. 1052 (Chadbourne Revision). However, that discus-

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* As demonstrated by the prosecutor's comments at trial Gallentine's prior testimony had, initially, been received by the trial court only for purposes of impeachment, and decision was reserved with respect to its admissibility as substantive evidence. Toward the end of the government's case, the trial court had still not ruled on the issue, and the prosecutor commented as follows:

> "Well, Your Honor, it seems to me there is, the very least, a potential problem on the subject of motions to dismiss the case at the close of the government's case without that evidence in the case as substantive evidence." (Tr. 356).

sion is not within the context of the admission of prior inconsistent testimony as substantive evidence but within the context of the admission of such testimony for the purpose of impeachment:

> "A common difficulty is to determine whether some broad assertion, offered in contradiction, really assumes or implies anything specifically inconsistent with the primary assertion.
>
> "The usual case of this kind is that of a *general statement upon the merits of the controversy*, which is now offered against a witness who has testified to a specific matter. Thus, A testifies for the prosecution that he saw the defendant near the scene of the alleged arson; it is offered to show that he has elsewhere declared that he is sure that the defendant is innocent; is this admissible?
>
> "The usual answer of some courts is that the declaration should be excluded bec use it is mere opinion (§ 1918, *infra*). This is unsound, (1) because the declaration is not offered as testimony (§ 1018, *supra*), and therefore the opinion rule has no application and (2) because the declaration in its opinion aspect is not concerned, and is of importance only so far as it contains by implication some contradictory assertion of fact. In short, the only proper inquiry can be, Is there within the broad statement of opinion on the general question *some implied assertion of fact* inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion. * * *" [Emphasis as in original]

See also: *United States* v. *Barrett*, 539 F.2d 244, 254 (1st Cir., 1976).

As can be seen from the analysis in *Wigmore, supra*, it is assumed that previously expressed bare opinion and conclusory assertions are inadmissible as substantive evidence even if they are apparently inconsistent with the witness's present trial testimony.

The recent enactment of Rule 801 was in a setting of a conflict in the Circuits on this issue. The majority prohibited prior inconsistent statements as substantive evidence.* This Circuit, however, adopted the minority view and permitted such statements to be used as substantive evidence. *United States* v. *DeSisto*, 329 F.2d 929 (1964), *cert. den.*, 377 U.S. 979 (1964). Thus, more than a decade before the adoption of Rule 801, this Court in *United States* v. *DeSisto, supra*, permitted prior inconsistent testimony to be used as substantive evidence in the case. However, neither *DeSisto*, nor any subsequent case referring to it, involved prior testimony that was incompetent for reasons other than hearsay.

In *DeSisto*, a truck driver identified the defendant both before the grand jury and at a former trial as being a hijacker. The former trial had resulted in a conviction which was later reversed. At a second trial, on direct examination, the witness again identified the defendant. However, on cross-examination, the witness denied the identification. His prior grand jury and trial testimony

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* Prior to the enactment of the Federal Rules of Evidence, the prevailing rule in Federal courts was that prior inconsistent statements could be introduced into evidence only for purposes of impeachment, and not as substantive evidence unless, at the time the statement was made, the defendant had an opportunity to cross-examine the declarant. *See*: *United States* v. *Lester*, 491 F.2d 680 (6th Cir., 1974); *United States* v. *Tavares*, 512 F.2d 872 (9th Cir., 1975); *United States* v. *Allsup*, 485 F.2d 287 (8th Cir., 1973); *United States* v. *Jones*, 482 F.2d 747 (D.C. Cir., 1973); *United States* v. *Wright*, 489 F.2d 1188 (D.C. Cir., 1973); *United States* v. *Morlang*, 531 F.2d 183 (4th Cir., 1975); *United States* v. *Greene*, 399 U.S. 149, 154-155 (1970).

were then received as substantive evidence. This Court affirmed the resulting conviction upon the ground that the prior statements had been properly received since they had been given under oath and the witness had been available at trial for cross-examination.

Neither *DeSisto* nor its progeny, have ruled upon the issue which we now present to this Court, although four of those opinions may be considered as obliquely adverting to the problem. The remaining opinions in the *DeSisto* line are set forth in the margin. Neither their facts nor their holdings even remotely concern the problem—thus bearing witness to the relatively extreme use to which allegedly prior inconsistent testimony was utilized in the present case.*

In *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir., 1967), a government witness testified that he had engaged

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* *Taylor* v. *Baltimore & Ohio Railroad Co.*, 344 F.2d 281, 283-5 (2d Cir., 1965); *United States* v. *Carella*, 411 F.2d 729, 732 (2d Cir., 1969); *United States* v. *Insana*, 423 F.2d 1165, 1169-70 (2d Cir., 1970); *United States* v. *Classen*, 424 F.2d 494, 495 (6th Cir., 1970); *United States* v. *Mingoia*, 424 F.2d 710, 713 (2d Cir., 1970); *United States* v. *Fiore*, 443 F.2d 112 (2d Cir., 1971); *United States* v. *Small*, 443 F.2d 497, 498-500 (3d Cir., 1971); *United States* v. *Cunningham*, 446 F.2d 194, 198 (2d Cir., 1971); *United States* v. *Panzavecchia*, 446 F.2d 1293, 1297 (5th Cir., 1971); *United States* v. *Briggs*, 456 F.2d 908, 909-911 (2d Cir., 1972); *United States* v. *Ruth*, 461 F.2d 1213 (D.C. Cir., 1972); *United States* v. *Gregory*, 472 F.2d 484, 487-9 (5th Cir., 1973); *United States* v. *Allsup*, 485 F.2d 287 (8th Cir., 1973); *United States* v. *Pfingst*, 477 F.2d 177, 197-198 (2d Cir., 1973); *Northwestern Mutual Life Insurance Co.* v. *Linard*, 498 F.2d 559, 560 (2d Cir., 1974); *United States* v. *Skelley*, 501 F.2d 447, 454-5 (7th Cir., 1974); *United States* v. *Robinson*, 503 F.2d 208, 217 (7th Cir., 1974); *United States* v. *Tavares*, 512 F.2d 872 (9th Cir., 1975); *United States* v. *Rivera*, 513 F.2d 519, 525-528 (2d Cir., 1975); *United States* v. *Jordano*, 521 F.2d 695 (2d Cir., 1975); *United States* v. *Wolfish*, 525 F.2d 47, 461-2 (2d Cir., 1975).

in four narcotics transactions, and that two of those transactions had been with the defendants on trial. During a prior trial, not involving those defendants, the same witness testified to only two narcotics transactions, neither of which involved the defendants on trial. The defense, in *Nuccio*, offered the witness's prior testimony as substantive evidence, but the trial judge limited the jury's use of the testimony solely to the issue of credibility. In sustaining the trial judge's ruling, this Court analyzed the two distinct theories upon which prior testimony may be received as substantive evidence at a subsequent trial:

> "In [United States v. Borelli, 336 F.2d 376 (2d Cir., 1964)] we merely adhered to the established doctrine that when a witness specifically reaffirms the truth of something he has said elsewhere, the earlier statement constitutes evidence as fully as what he says on the stand. Citing many cases, we pointed out that 'This principle long antedates and is quite different from our decision in United States v. DeSisto * * * ' * * * *However, a witness scarcely reaffirms the truth of a prior statement within the meaning of this rule when he says that, although the statement was true, it was not directed to facts now at issue.* The rule, for example, would not require equating the affirmation of a previous statement that the witness had never seen John Doe with trial testimony that he had, if the former statement related to an earlier period." (373 F.2d at 172) [emphasis added].

Thus, *Nuccio* makes clear one of the distinctions between the use of an apparently inconsistent statement for purposes of impeachment and the use of the same statement as substantive evidence. An apparently inconsistent statement may always be used for purposes of impeachment and the jury may take into account the witness's

explanations in assessing the statement's impeaching effect. On the other hand, a prior statement will not be admitted as substantive evidence under he *Borelli* theory unless it can be demonstrated that the testimony is, in fact, inconsistent. This later requirement is not met if the context of the prior testimony or the limited or equivocal nature of the prior questions or answers foreclose a definitive finding of inconsistency.

Nuccio then went on to examine the same facts within the context of the holding in *DeSisto*. After first expressing some doubt as to the availability of the *DeSisto* rationale to a *cross-examiner*, this Court went on to state:

> "* * * Moreover, and even more important, the earlier testimony here in question, unlike that in *DeSisto*, was not given at a former trial in the same case where the witness's mind was focused on the identical fact at issue in the later one. Although testimony at the trial of another case may be used for impeachment subject to such explanation as the witness may make, where the prior testimony was given in a different case with different parties involving different issues, a trial judge may properly consider the dangers to be too great to warrant the admission of the evidence as affirmative evidence.* * *" (373 F.2r at 172-3).

Nuccio, of course, only went as far as it had to in discussing the problem of "focus". However, it demonstrates that lack of "focus" in the prior examination of the witness is a proper reason for not admitting the prior testimony as substantive evidence.

In *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir., 1974), a defendant sought to introduce as substantive evidence a government witness's prior photographic iden-

tification of another defendant. In approving the trial court's refusal to receive such evidence for substantive purposes, this Court stated, *inter alia*:

> "* * * [T]here was little reason to credit Evans' prior out-of-court photographic identification of Wilcox, especially since Evans was unable to repeat it at trial and Agent Batt testified on voir dire that Evans was somewhat equivocal in making his identification. *The level of certainty demonstrated by a witness is clearly one factor to consider in assessing the reliability of his confession.* See: Neil v. Biggers, 409 U.S. 188, 199 (1972)." (496 F.2d at 69-70).

We can thus extract from *Jenkins*, *supra*, the principle that the "level of certainty" of prior, allegedly inconsistent testimony, is directly relevant to the issue of admissibility of such testimony as substantive evidence. It is manifest that the "level of certainty" will be a reflection of both the nature of the questions put to the witness and the character of his answers during that prior testimony.

In *United States* v. *Klein*, 488 F.2d 481 (2d Cir., 1973), this Court sustained the use of a witness's prior inconsistent testimony, under the *DeSisto* rationale, but noted that "the case against [the defendant] was so strong that it is impossible to believe that anything turned on the admission of Mrs. Clou's equivocal testimony before the grand jury" (488 F.2d at 484). We are thus presented with the first reference by this Court, within the context of a *DeSisto* discussion, of prior *equivocal* testimony. Due to the strength of the government's other evidence, however, this Court had no occasion to reach the issue of whether prior equivocal testimony is properly admissible as substantive evidence or whether such testimony may constitute all or the bulk of the government's evidence against a particular defendant.

United States v. *Gerry*, 515 F.2d 130 (2d Cir., 1975) is the only discovered case in which an appellant challenged *DeSisto* evidence upon the ground that the prior testimony would not have been admissible if given in the first instance at the trial itself. In *Gerry*, a government witness's grand jury testimony included hearsay statements of a conspirator (Sherman) inculpating the defendant on trial. The defendant objected to the admissibility of the witness's grand jury testimony upon the ground that, "under the law in this Circuit it must first be shown by a fair preponderance of the non-hearsay evidence that Sherman participated in the conspiracy" (515 F.2d at 141). This Court declined to decide the issue since it found that there was in fact sufficient non-hearsay evidence to establish Sherman's participation in the conspiracy.

2. The Rules of Evidence applied to Gallentine's grand jury testimony.

In order to facilitate reference to Gallentine's testimony, we have numbered each of the questions put to him in the grand jury:

> [1] "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the firm?
>
> "A. No, no. Mr. Rind just handled—Mr. Rind set up the transactions, be they sales or loans, and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind.
>
> [2] "Q. Well, you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?

"A. Well, I had conversation with them as to how we got through the day cash-wise, what we had to do in order to get up the amount of cash necessary.

[3] "Q. In other words, from time to time you would tell them that Mr. Rind arranged for the transactions in stock to generate some cash and you provided customers securities to cover that transaction, and that is how you got the cash on a particular given day?

"A. Yes, yes.

[4] "Q. And you would explain to them that you actually went through the process of the unauthorized use of customers' securities for this purpose?

"A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities.

[5] "Q. And both Mr. Berkson and Mr. Hyman knew about that?

"A. Yes.

[6] "Q. And the reason you can say that is that you specifically recall telling them about what was going on?

"A. Yes, I spoke to them about it."

The questions and answers were objectionable for the following reasons:

Answer "1". It is improper because the witness was permitted to conclude that Mr. Berkson and Mr. Hyman were "aware."

Question "2". The question repeats the improper conclusion that "Mr. Hyman and Mr. Berkson were aware",

and then, without separating the questions as to Hyman and Berkson, asks how they were aware of what was going on.

Answer "2". The answer is improper because, without being specific as to whether the witness was talking about Hyman or Berkson, he is permitted to give testimony as to a conversation, in summary form, without being required to specify the content of the conversation, and without specifying the time, place or participants. (I had conversation with them as to how we got through the day cash-wise . . .")

Question "3". The question simply picks up on the answer to question "2", and has the witness reaffirm the answer, again referring to "them", without testifying as to what was said to Berkson and what was said to Hyman, or as to whether he was talking to them alone or separately.

Question "4". The question is improper because it uses the conclusory word "unauthorized", and also because it refers to "them" without stating what the witness said to Berkson or what the witness said to Hyman.

Question "5". The question is improper because it uses the conclusory word "knew" in asking whether "Mr. Berkson or Mr. Hyman knew about that", and it does not call for the witness to make clear as to whether his assent to the question is based upon knowledge conveyed by him to Berkson or Rind, or information which he assumes they "knew" based upon his speculation.

Question "6". The question is improper because it refers to "them", without referring to what was said to Berkson and Hyman, and permits the witness to answer, "I spoke to them about it", without requiring him to state what he said to Berkson and what he said to Hyman, or to specify the time and place of the conversation.

Aside from the obviously objectionable character of the above noted questions and answers, there is a subtle, and, for that reason, more devastatingly improper impact which the questions and answers have when taken as a group. While some of the questions appear to be attempting to narrow the field created by the prior question or answer, the successive questions and answers have a cumulative, "snowball" effect, picking up pockets of error, confusion and equivocation, and passing them through to the subsequent testimony.

It can readily be seen that Gallentine's grand jury testimony was, at best, equivocal. In response to each of the prosecutor's questions, he gave answers which were conclusory. The prosecutor, in turn, failed to elicit any specifics from Gallentine. As a result, Gallentine's testimony suffers from the defect of not specifically showing what Gallentine allegedly told Berkson. None of the questions are calculated toward isolating information imparted by Gallentine to Berkson from information imparted by Gallentine to Hyman. None of the questions and answers shows that Berkson was ever told that customers' names were being forged to securities. Similarly, none of the questions pinned Gallentine down on the issue of whether he conveyed any information to Berkson contemporaneously with the occurrence of the improper conduct or whether he did so after the fact. If the prosecutor had attempted to question Gallentine at trial in the same manner as he had questioned Gallentine before the grand jury, objections to the questions would clearly have been sustained. Moreover, the prejudice was compounded by the lapse of time (three years) between the objectionable testimony and the trial at which the witness was asked to explain it.

* * * * *

We submit that, within the meaning of *Nuccio*, *supra*, Gallentine failed to reaffirm his prior testimony and that,

in any event, the questions and responses before the grand jury did not adequately "focus" upon a factual basis for the contention that Berkson knew about and participated in the alleged criminal scheme. Moreover, the grand jury testimony was devoid of any "level of certainty" (*Jenkins, supra*), and was, at best, equivocal (*Klein, supra*). As such, it did not fulfill the fundamental requirements of substantive evidence.

Gallentine's grand jury testimony, taken as a whole, does not amount to much more than an expression of belief that Berkson was aware of some of the activities that underlie the charges of the indictment in this case. Since no particularized statement of the basis for that belief was elicited from or given by Gallentine, the holding of *Shepard* v. *United States*, 290 U.S. 96 (1933) is particularly relevant to the question of whether such testimony would have been admissible at the trial, in the first instance.

In *Shepard*, the government was permitted to elicit evidence that, prior to her death the wife of the defendant had expressed the belief to a third party that the defendant had poisoned her. In his opinion for the Court, reversing the judgment of conviction, Justice Cardozo articulated the fundamental principles which have since been applicable with respect to extra-judicial statements of belief by one person concerning the intent or state of mind of another person:

> "* * * It [the government] used the declarations as proof of an act committed by someone else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge,

> and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The *reverberating clang of those accusatory words would drown out all weaker sounds.* It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in consideration of administrative convenience, of practical expediency, and not in rules of logic. *When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.*" (290 U.S. at 104) [emphasis and bracketed material added; citations omitted].

Justice Cardozo further stated:

> "* * * Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
>
> "The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by someone not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury." (290 U.S. at 106).

See also: *United States* v. *Murray*, 297 F.2d 812, 816 (2d Cir., 1962).

Under *Shepard*, *supra*, Gallentine's expressions of belief and conclusory testimony were certainly inadmissible. Moreover, our argument is fully supported by other sections of the Federal Rules of Evidence.

Rule 602 of the Federal Rules of Evidence provides:

"*Lack of personal knowledge.*

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

Rule 701 provides:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

There is no indication that Gallentine's grand jury testimony is based upon his personal knowledge. The grand jury testimony is nothing more than Gallentine's opinion. The trial court acknowledged that Gallentine's grand jury testimony involved a characterization of Berkson's "mental operations" (Tr. 99), and the Court acknowledged that the grand jury testimony was conclusory, i.e., "this is evidence of his opinion of what Berkson knew." (Tr. 100). The jury should have been required to pass upon Berkson's knowledge based upon clear, factual evidence as to what Berkson was or was not told and as to when any such information was imparted to him in relation to the underlying events. When apparently inconsistent grand jury testimony is converted into substantive evidence and its function is no longer merely that if impeachment, it must conform to the rules

generally applicable to substantive trial evidence. Here, there was no rational basis upon which the jury could assess the reliability or even the meaning of the conclusions which were contained in Gallentine's grand jury testimony.

Another objection to Gallentine's grand jury testimony is that it consists of nothing more than leading questions of the prosecutor with the questions being adopted as answers by Gallentine.

Rule 611(c) of the Federal Rules of Evidence provides that leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. In commenting upon that rule, Judge Weinstein's text quotes from Denroache, *Leading Questions*, 6 Crim. L.Q. 21, 22 (1963), with respect to the reasons for the general rule that a witness may not be led on direction examination:

> "First, that the witness is presumed to have a bias in favour of the party calling him; secondly, that the party calling a witness, knowing what that witness may prove might, by leading, bring out only that portion of the witness's story favourable to his own case; and thirdly, that a witness, intending to be entirely fair and honest might assent to a leading question which did not express his real meaning." (3 Weinstein's *Evidence*, ¶611[05], at p. 611-54).

The above noted comments apply directly to Gallentine's grand jury testimony. While it is true that a Court, under Rule 611(c) has discretion to permit a certain amount of leading on direct examination, the jury, at least, has the opportunity to observe the leading process. As Judge Weinstein notes:

> "The tenor of the desired reply can be suggested in any number of ways, as, for example,

> by the form of the question, by emphasis on certain words, by the tone of the questioner or his non-verbal conduct, or by the inclusion of facts still in controversy." (Weinstein's *Evidence, supra*, at pp. 611-54-55).

Rules 602 (requirement of personal knowledge) and 701 (opinion by lay witnesses), both quoted *supra*, have an interrelationship which is discussed by Judge Weinstein as follows in paragraph 602[03] of his text:

> "The requirement of personal knowledge may arise in two ways in conjunction with the lay opinion rule. Read with Rule 701, the witness is required to have first, made observations supporting the opinion *and second, reported the observations by giving as much of the raw data as is practicable.*" [Emphasis added].

Obviously, in his grand jury testimony Gallentine was not called upon to, and did not provide any of the "raw data" for the opinion which he appeared to express concerning Berkson's knowledge. Assuming, *arguendo*, that any opinion of Gallentine in this respect would have been admissible as part of his trial testimony, it would certainly not have been admissible without the foundation of "raw knowledge". There is no reason why the rule should be different when applied to the admissibility of allegedly inconsistent prior grand jury testimony.

In *United States* v. *Borelli*, *supra*, 336 F.2d at 392, this Court made a remarkably similar assessment of the testimony of a government witness, Ager, as follows:

> "Ager had referred to the suitcases as having 'sixteen units'; he later amplified this to 16 kilograms. When pressed by the government for further explanation, he said 'it must have been narcotics.' On this being ruled out, the prosecutor,

> over objection, was allowed to ask 'Do you know now what was in those suitcases?', which elicited substantially the same answer as had been rightly stricken; the objection should have been sustained in the absence of a showing that Ager was giving 'an impression derived from the exercise of his own senses, not from the reports of others,' or from speculation based on the high price paid. 2 Wigmore *Evidence*, § 657(a) (1940 ed)."

In *Bronston* v. *United States*, 409 U.S. 352 (1973), in assessing the scope of liability under the Federal perjury statute, the Court noted:

> "* * * But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to wilfully state any material matter that *implies* any material matter that he does not believe to be true." (409 U.S. at 357-8) [Emphasis as in original].

We, of course, recognize that *Bronston*, in focusing upon the liability of a perjury defendant, relied to a great extent upon the history and purpose of perjury legislation, including the policy "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." (409 U.S. at 358). To that extent, *Bronston* is distinguishable from the problem involved in the present case. However, much of what the Court said in *Bronston* provides an excellent rationale for the proposition that prior allegedly inconsistent grand jury testimony must first meet the condition of being fairly precise and have a proper foundation before it can be used as substantive evidence in a subsequent trial upon which a defendant's guilt beyond a reasonable doubt will be predicated. Grand jury testimony need not meet the latter qualification in order to justify a valid indictment.

By Rule 801, Congress has created a new function for grand jury testimony, the quality of the testimony must be such as to meet the requirements of the function. Unless this is so, Rule 801 will be nothing less than an engine for destruction of the rules of evidence. The prosecutor could regularly ask his grand jury witnesses unfounded questions, calling for conclusory answers, and then if the witness disappoints the prosecutor at trial, the grand jury testimony would come in as substantive evidence.

Bronston assessed the obligation of the prosecutor in the grand jury, stating *inter alia*: "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." (409 U.S. at 360), and holds that "* * * A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; * * *" (409 U.S. at 358). (*See also*: Id., fn. 4).

We respectfully submit that the grand jury testimony of Gallentine should not have been received as substantive evidence because the prosecutor, during the course of the grand jury proceeding, failed to focus upon Federal trial evidentiary standards in his interrogation. Neither the questions, nor Gallentine's answers would have been permissible if given for the first time at the trial itself. No rule of law or logic supports any different conclusion merely because testimony was given at a prior *ex parte* proceeding. On the contrary, the fact that the prior proceeding was *ex parte* is all the more reason why such testimony should be excluded.

3. Conviction based upon Gallentine's testimony was violative of due process of law and of the defendant's right to confront and cross-examine the witness against him.

In *Greene* v. *California*, 399 U.S. 149 (1970), the Court held that the use of prior inconsistent statements as substantive evidence does not, *per se*, violate the confrontation clause.* *Greene*, however, distinguishes *Bridges* v. *Wixon*, 326 U.S. 135 (1945), which had reversed a Federal conviction due to lack of compliance with Federal evidentiary standards. *Greene* goes on to note:

> "* * * While we may agree that considerations of due process, wholly apart from the confrontation clause might prevent convictions where a reliable evidentiary base is lacking, see *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), we do not read *Bridges* as declaring that the constitution is *necessarily* violated by the admission of a witness's prior inconsistent statement for the truth of the matter asserted. The Court's opinion in *Bridges* does not discuss the confrontation clause." [Emphasis added].** (*Ibid*).

The theme appears to be echoed by Judge Weinstein:

> "It would appear that some of the opposition to this Rule [801(d)(1)(A)] is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate."

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* See: Greene at fn. 15 p. 163.

** An examination of the record in *Greene* shows that the prior testimony was not otherwise objectionable.

We respectfully submit that, assuming Gallentine's grand jury testimony to have been admissible, it was certainly not sufficient evidence upon which the jury could properly convict Berkson.

In his charge, the Court instructed the jury as follows:

> "If you believe the testimony of Gallentine to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant even though it is not corroborated by any other evidence." (Tr. 567).

If the Court was actually referring to Gallentine's trial testimony, the the Court's charge (to which exception was taken; Tr. 593) was clear error which requires a reversal. Gallentine's trial testimony came nowhere near establishing the requisite knowledge and participation on the part of Berkson. On the other hand, if the Court was referring to Gallentine's grand jury testimony, then we are squarely presented with the issue discussed in *Greene*, *supra*, and in Judge Weinstein's text.

Assuming, *arguendo*, that the Court's charge referred to the grand jury testimony, we urge that that testimony was so qualitatively deficient that a conviction predicated upon it is violative of due process of law. The Court permitted the prosecution to place before the jury manifestly inadequate prior testimony of the witness and permitted the jury to draw whatever inferences it wished. The prosecutor put his finger on the problem in summation by stating the issue as follows:

> "Did Robert Berkson know about it, did Maurice Rind know about it, and did they take part in what was going on?" (Tr. 420)

In his rebuttal the prosecutor analyzed the quality of the truth-finding process by which the jury had resolved that issue:

> "* * * [W]e are all hearsaying to you, 'Mr. Gallentine said this, this and this, and if it happens to help, the result will be we rely on it, and if it doesn't, he must not be telling the truth,' and I suppose to some extent we have all done that . . .
>
> "Well, whatever Mr. Gallentine was saying, you will have to decide.***" (Tr. 541)

We respectfully contend that, there reaches a point where prior testimony, offered for the truth of its contents, is so equivocal and so lacking in evidentiary worth, as to deprive a defendant of any meaningful opportunity to confront the witness. In a situation where the testimony is clearcut and unequivocal, the witness can at least be called upon to give an explanation for his change in testimony and then the credibility of his explanation may be left for the jury to decide. However, where the prosecutor seeks to argue merely from inferences which he seeks the jury to draw from the prior testimony, the testimony then becomes twice removed from the trial itself. No meaningful confrontation or cross-examination can ther follow when that testimony is conclusory and otherwise incompetent.

We respectfully urge that Gallentine's grand jury testimony was improperly admitted as substantive evidence in the case. The improper admission of such evidence requires a reversal of the conviction against Berkson.

POINT II

The government failed to establish guilt beyond a reasonable doubt.

The thrust of the government's case against Berkson consisted of the claim that Gallentine told Berkson of the misuse of customers' securities. Even if that were established by competent evidence it would not be enough to make out a violation of the various fraud statutes upon which the counts of the indictment were predicated.

As the Court charged the jury, each of the crimes required some affirmative conduct by the defendant as an essential element (See: Tr. 574, 578-80). There was simply no showing of any affirmative conduct by Berkson. He did not initiate, propel or facilitate the conduct in question. Even if he knew "what was going on", he was not criminally liable for it in this case because the Court charged the jury that in addition to knowledge, they must find that Berkson participated in the crime.

In *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973), this Court reaffirmed the following familiar principles with respect to the aiding and abetting and conspiracy theories of liability:

> "* * * 'Knowledge that a crime is being committed, even when coupled with presence at the scene,' without more, however is generally insufficient to prove aiding and abetting. See also: United States v. Fantuzzi, 463 F.2d 683 (2d Cir., 1972); United States v. Ciancetti, 315 F.2d 584, 588 (2d Cir., 1963) (co-conspirator must make an "affirmative attempt" to further the purpose of the conspiracy); United States v. Euphemia, 261 F.2d 441, 442 (2d Cir., 1958). *Cf.* United States v. DiRe, 159 F.2d 818, 820 (2d Cir., 1947), aff'd.

> 332 U.S. 581 (1948) (presence of third persons with parties to conspiracy not sufficient to support a warrantless arrest."), (474 F.2d at 875).

Similarly, in *Nye* v. *Nissen* v. *United States*, 336 U.S. 613, 619, quoting in part *United States* v. *Peoni*, 100 F.2d 401 (2d Cir., 1938), the Supreme Court held:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

Aside from the impermissible inferences which the government sought to have the jury draw from Gallentine's incompetent grand jury testimony, there was no trial evidence that Berkson knew of the scheme to forge customers' signatures and illegally convert customers' stock for the use of PW. Since Berkson was a principal and corporate secretary of PW, and functioned as a customers' man for various customers of PW, it is hardly surprising that the government was able to adduce some evidence concerning the fact that Berkson engaged in some activities in behalf of PW. The issue, of course, was whether those activities constituted circumstances from which the jury could properly conclude, beyond a reasonable doubt, that Berkson was contemporaneously aware of the schemes charged in the indictment and engaged in some affirmative attempt to further the criminal objectives of those schemes. We submit that his activities, individually and cumulatively, do not support such a conclusion.

It will be recalled that the first misuse of Leasepac stock related to the use of 10,000 shares of the stock as collateral for a $300,000.00 loan which was negotiated by Rind (*supra*, p. 17). The only trial evidence that Berk-

son was even aware of the loan consisted of a certified copy of a PW resolution authorizing the pledging of 10,000 shares of Leasepac stock as collateral for the loan in August, 1970 (Tr. 49-50; GX 15). The resolution was signed by Berkson as secretary of the Corporation. There was no evidence that, at the time of the transaction, or later during the conspiratorial period, Berkson knew that the 10,000 shares of stock were not legitimately part of PW's trading account. Indeed, Gallentine, who was intimately familiar with the contents of PW's trading account, had to inventory the account before ascertaining that he could not comply with Rind's requests for the shares without invading customers' safekeeping accounts (Tr. 40-2).

Another activity relied upon by the government concerned the account of Eleanor Melling, one of Berkson's customers. At an unspecified time during the summer of 1970, she asked Berkson whether she should sell her Leasepac holdings, and he advised against it (Tr. 254-7). There was no evidence at trial that this was, objectively, inappropriate advise, either with respect to the then market position of Leasepac stock or with respect to the objectives of the Melling account. It can hardly be suggested that Berkson's advice constituted circumstantial evidence of an effort to facilitate the misuse, by others, at PW, of the Melling Leasepac holdings. In order to support such an inference, the government elicited testimony that, with respect to another customer, Sam Caplan, over whose account Berkson had broad discretion, Berkson legitimately sold 200 shares of Leasepac stock and forwarded the proceeds to Caplan (Tr. 230-1, 238-241). Government counsel argued in summation (Tr. 538-9), that since the Caplan sales occurred during the same summer, Berkson's different determinations with respect to the two accounts demonstrated that hi s advice to Miss Melling was with some malevolent purpose.

The argument is absurd. It is manifest that, even on a day to day basis, a broker can legitimately give different advice to different customers, or even to the same customer, depending upon market trends and the objectives of the customer's account. Particularly in view of the sparce record as to the relative times and circumstances of each of Berkson's determinations, any inference linking the Melling determination to the schemes charged in the indictment would be speculative in the extreme.

There was a good deal of evidence that during the period of the alleged conspiracy, PW was in a very poor financial position. In an effort to enhance that position, PW engaged in a certain amount of check kiting between its own account and the accounts of Gallentine and Hyman's secretary, Patricia (*supra*, p. 5, fn.). Since Berkson signed a number of the PW checks that were used in the check kiting scheme, the jury might properly conclude that he was aware of *that* activity. The check kiting however, did not constitute any part of the charges of the indictment, and the Court so instructed the jury (Tr. 347). It would have been impermisible for the jury to leap from that evidence to the conclusion that Berkson was aware of and participated in other, distinct, criminal activities.

There was evidence that on August 20, 1970, Ephraim Bloch's Robotguard stock was delivered to PW, and on or about the same day 10,000 shares of that stock, bearing forged stock transfer powers, were transferred to the account of an entity called "R.G. Berkson & Co.", and pending payment, PW posted the stock as collateral with the Sterling National Bank. Certificates were subsequently returned to PW on September 22, 1970.

Gallentine consummated that transaction at the direction of Hyman, who alleged that the stock belonged to

PW and there is no evidence that Berkson was actively involved in the transaction or that he was aware of any fraudulent means that were utilized to accomplish it.

In an effort to establish such knowledge and participation, the government called Berkson's father as a witness. He testified that in August or September of 1970, his son called him, stating that he was calling at Hyman's request, and wondering if the elder Berkson would purchase 10,000 shares of Robotguard stock. He agreed to do so, but, a few days later, his son called back stating ". . . . it wasn't necessary, Mr. Hyman would take care of it." (Tr. 353-4). Again, the government's evidence led down a blind alley. It demonstrates that Berkson was so unaware of the machinations in which Hyman was engaging with respect to customer stock, that he, himself, was induced by Hyman to bring in approximately $40,000.00 of his own father's money. There is no indication in the record as to whether Berkson knew how Hyman, "would take care of it."

The final item of evidence from which the government sought to draw an inference of guilty knowledge related to a stock dividend which PW had received from Lensepac in or about mid-September, 1970. According to Gallentine, about two or three weeks after the dividend was received, he mentioned it to Berkson and stated that there would be a number of customers who would not be receiving their dividends directly because, "We had to use some of the customers' securities." (Tr. 94-7, 136-9, 197-8). He characterized Berkson's response as follows: "He mentioned to keep a record of it so we would know who was entitled to the dividend, who would be entitled to their dividend." (Tr. 96), and that was their entire conversation on the subject. There was no discussion of misuse of customers' securities, nor was there any showing that this conversation or any other activity on Berk-

son's part intentionally advanced the purposes of the alleged conspiracy.

Since no actual knowledge and no affirmative action on the part of the defendant Berkson was established by the government's proof, it is respectfully submitted that his guilt was not established beyond a reasonable doubt, and the judgment of conviction should be reversed.

POINT III

The trial court erred in charging the jury as to the issue of "conscious avoidance" in view of the nature of the government's proof.

Either the defendant knew or he did not know that customers' securities were being forged and unlawfully utilized by PW. The government's theory of the case was that the defendant had specific knowledge. There was no evidence that his duties at PW would bring such knowledge home to him, or that he had actual exposure to the criminal conduct.

The Court charged the jury however:

> "In determining whether a defendant acted knowingly you may consider whether the defendant deliberately closed his eyes in order to deliberately avoid knowing what otherwise would have been obvious to him." (Tr. 574).

Counsel for the defendant Berkson objected to that charge upon the ground that it did not present an appropriate theory for conviction within the context of this case (Tr. 594).

Moreover, the Court's conscious avoidance charge failed to give the jury any guidance as to *what* the de-

fendant may have consciously avoided which would have made him liable for the crimes charged. Not even Gallentine's grand jury testimony shows that the defendant was even brought to the brim of awareness that customers' signatures were being forged.

Under the peculiar circumstances of the facts and the nature of the government's proof in this case, the conscious avoidance charge improperly encouraged the jury to convict the defendant upon a speculative basis not supported by the evidence. For that reason the judgment of conviction should be reversed.

CONCLUSION

For all of the above reasons, the judgment of conviction should be reversed, and the indictment should be ordered dismissed due to insufficiency of evidence; in the alternative, the defendant should be granted a new trial.

Respectfully submitted,

EDWARD BRODSKY, ESQ.
Spengler, Carlson, Guber,
Churchill & Brodsky, Esqs.
Attorneys for Defendant-Appellant Robert Berkson

HENRY J. BOITEL,
ALAN DERSHOWITZ,
Of Counsel.

Rec'd. 2 copies
L. B. Pedowitz
by: M. Rothenberg, Esq.

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N. Y.